INDEX

PAGE

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE COURT DOES NOT HAVE JURISDICTION 2

II. ANSWERS TO CONTENTIONS OF PETITIONER 11

III. CONCLUSION 13

Table of Cases

Thomas A. Edison, Inc. v. Shotkin (D.C. Colorado) 69 Fed. Supp. 176 10

Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 9

Percy's Case, 36 N. Y. 651 10

Shotkin v. Burke, et al (D.C. Colorado) unreported 5,6,7,8,9,11

Shotkin v. Burke, et al, 170 Fed. (2d) 368 5-6

Shotkin v. Burke, et al, 335 U.S. 888, 69 Sup. Ct. 231 6

Shotkin v. Kaplan, 116 Colo. 295 2,3,5,10,13

Shotkin v. Kennedy, Acting Judge, 326 U.S. 684 11

Shotkin v. People, ex re Attorney General of Colorado, 120 Colo. ——, 212 P. (2) 1007 1

Uveges v. Pennsylvania, 335 U. S. 437 11

Other Authorities

17 C. J. S. 103 13

93 Law Ed. 137 11

Sup. Ct. Rule 38, Par. 5 and 5 (a) 1

IN THE

Supreme Court of the United States

October Term, 1949

No. 817

BERNARD M. SHOTKIN, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF COLORADO, ex rel, THE ATTORNEY GENERAL OF THE STATE OF COLORADO, RESPONDENT.

BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

SUMMARY OF ARGUMENT

There are *no* special and important reasons for granting of review on Writ of Certiorari (Supreme Court Rule 38, Par. 5), there being *no* Federal question of substance decided in the decision of the Supreme Court of the State of Colorado, (R. 75) 120 Colo. ——; 212 P. (2d) 1007) which is herein sought to be reviewed by petitioner's Petition for Writ of Certiorari (Sup. Ct. Rule 38, Par. 5 (a)). The question presented and determined by the Supreme Court of the State of Colorado was merely a

disciplinary matter to punish petitioner for violating the mandate of the Supreme Court of the State of Colorado, in the case of *Shotkin v. Kaplan,* 116 Colo. 295 (1947). Hence this Honorable Court does not have jurisdiction to entertain the petition for Writ of Certiorari.

ARGUMENT

I.

THE COURT DOES NOT HAVE JURISDICTION

In the case of *Shotkin vs. Kaplan,* 116 Colo. 295, 297, 297 (1947), the Supreme Court of Colorado made certain observations concerning this petitioner as follows:

> "Some further observations are in order, based whereon additional orders are justified. Bernard M. Shotkin is a business man, active, and seemingly successful. Moreover, there is every evidence that he is possessed of ample means with which to indulge his desire for litigation. *It appears that he goes in for it 'wholesale.' He has a multitude of cases pending* in the district court of Denver, some half dozen in the Denver county court, several here, some in the United States District Court for Colorado, as well as in the United States Circuit Court of Appeals for the Tenth Circuit, and, until recently, a case in the Supreme Court of the United States, which originated in Denver. For the most part, he has appeared pro se. Some of the cases grew out of previous ones in which he has been unsuccessful, and in which frequently he includes as parties defendant, lawyers who have opposed him in his fruitless attempt in earlier litigation, and sometimes those judges who have found it compatible with their judgment to rule adversely to him. *In short, Shotkin, proceeding largely sans lawyers, and otherwise more or less irregularly, interferes with the functioning of all the courts within the jurisdiction*

of Colorado, including ours, and materially impedes judicial progress. Much of our time in the last several months has been taken up with the consideration of features of writs of error obtained by him, which, for the most part, have no semblance of merit. We are a busy judicial tribunal, constantly engaged in examining, determining and adjudging causes presented for our consideration by writs of error prosecuted by counsel qualified, as well as disposed, to proceed in ample and understandable form. Shotkin has much of the learning of lawyers, but does not consider himself formally bound, as they are, to observe rules calculated to promote orderly and just administration of justice, and which he violates at pleasure. Were he a member of the bar, our disciplinary authority would enable us, proceeding thereunder, to meet the situation otherwise. *It follows, that, only by the requirement that he employ counsel, may we return to the normal consideration of duties to trial courts as well.* What Shotkin does out of court is not of our immediate concern, but in the interest of discharging our never ending judicial duties, we are justified in withholding from him the right to appear in advocacy of his own writs of error. Also, in furtherance of our over-all purpose, it is necessary that in all cases pending here, or at nisi, where Shotkin appears as plaintiff in error, or plaintiff, he should promptly retain counsel, failing which, motions to dismiss such writs and cases will be entertained and determined in the light of this opinion." (Emphasis supplied.)

The Transcript of Record in the case at bar illustrates the Shotkin technique in "practicing law." This is one of many cases in which this petitioner has appeared in the courts of Colorado and in Federal courts, not only before the *Shotkin v. Kaplan* decision but since. A cursory review of said transcript indicates that from June 17, 1948 to November 4, 1948, (an interval of four and one-half

months) this petitioner filed in the Supreme Court of Colorado, a total of fifteen motions and petitions, together with supporting briefs. In order to present a clear picture, said motions and petitions are hereinafter set forth, together with filing dates.

Motion for order appointing counsel for respondent	June 17, 1948
Motion to dismiss complaint and quash order to show cause	June 26, 1948
Respondent's motion to reopen the ex parte denial of his motion to dismiss, etc.	July 19, 1948
Respondent's motion for extension of time to file answer	July 19, 1948
Respondent's petition to be excused from filing written answer to complaint and order to show cause, etc.	August 20, 1948
Respondent's petition for appointment of an attorney to represent him	August 30, 1948
Respondent's motion for extension of time to answer motion to strike	September 2, 1948
Respondent's reply to answer to his motion for extension of time	September 13, 1948
Reply to motion to strike respondent's answer	September 24, 1948
Respondent's petition for extension of time to file amended answer to complaint and order to show cause	October 8, 1948
Motion to quash and dismiss order to show cause	October 14, 1948
Amended answer and return to complaint and order to show cause	October 14, 1948
Petition for appointment of an attorney to represent respondent	October 19, 1948
Respondent's answer to motion to strike	October 21, 1948
Respondent's motion to dismiss complaint and quash order to show cause	November 4, 1948

Most of said motions and petitions are long and voluminous and contain much scandalous and libelous matter directed against a great number of outstanding members of the bar of Colorado (R. 16, 17, 18, 19, 28, 29).

Further, said motions and petitions contain matters which are impertinent, disrespectful and contemptuous of the Supreme Court of Colorado and further illustrate petitioner's repeated refusal to accept and abide by the Court's order and in repeating the same requests a number of times. As was stated by the opinion in *Shotkin v. Kaplan, supra,* he has sued a number of attorneys "who have opposed him in his fruitless attempt in earlier litigation," and he has even sued certain judges "who have found it compatible with their judgment to rule adversely to him." We wish to point out that the motions referring to said attorneys contain matters which have not been verified by any of the attorneys against whom said remarks have been directed; and that they are mere allegations of petitioner.

In *Shotkin v. Burke, et al.,* Action No. 2471, in the United States District Court for the District of Colorado, this petitioner filed a complaint against members of the Supreme Court of the State of Colorado, the Attorney General of Colorado, the Deputy Attorney General, Assistant Attorney General, Revenue Director of Colorado and two employees of the Revenue Director. In this action petitioner asked that the defendants be restrained and enjoined from proceeding further *in the contempt case* then pending in the Supreme Court of Colorado and *now sought to be reviewed by the instant Petition for Certiorari.* On August 6, 1948, the Honorable Walter A. Huxman, United States District Court Judge, dismissed the action on the ground that "there is a complete absence of any federal question which would give this court jurisdiction of this case." The appeal in said case was dismissed by the Circuit Court of Appeals for the Tenth Circuit without a

written decision, said action appearing at 170 Fed. (2d) 368; and certiorari was denied by the Supreme Court of the United States in Case No. 219 Misc., appearing at 335 U. S. 888, 69 Sup. Ct. 231. Although Judge Huxman's opinion was not printed and published in Federal Supplement, the following quotations from said opinion are taken from the written opinion on file with the Clerk of the Court.

> "He requests this court to quash the order of the Colorado Supreme Court to petitioner to show cause why he should not be punished for contempt. He alleges that the Colorado Supreme Court has no jurisdiction of the cause, that petitioner will be denied due process and equal protection of the laws (in contravention of the Fourteenth Amendment), and that the proceeding in contempt is in the nature of an ex post facto law. He claims that since that action is criminal in nature he is entitled to a trial by jury and to the assistance of counsel, both of which he presumes he will be denied.
>
> "Petitioner states that the reason for his pursuit of actions pro se subsequent to the order of the Colorado Supreme Court in Shotkin v. Kaplan, supra, was because of a conspiracy practiced against him by his attorney and other members of the Denver Bar whom he approached in regard to the bringing of certain actions and the filing of various motions referred to in the complaint in contempt. He alleges that he asked the Colorado Supreme Court to appoint counsel for him in the contempt case, but that his motion therefor was denied. He pleads lack of funds. He claims that the refusal to appoint counsel is in violation of his rights under the Sixth Amendment to the Constitution of the United States and under Rules 14b, 15c and 44 of the Federal Rules of Criminal Procedure.

"Petitioner states that the hearing by the Colorado Supreme Court of this order to show cause is in violation of Rule 42b of the Federal Rules of Criminal Procedure, in that it involves disrespect to or criticism of a judge and that the same judge is, by that rule, disqualified from presiding at the hearing; that the hearing also is in violation of Rule 42b of the Federal Rules of Criminal Procedure in that petitioner will be denied a jury trial in a criminal contempt hearing.

• • • •

"Finally, petitioner requests this court to declare the order made by the Colorado Supreme Court in Shotkin v. Kaplan, supra, null and void because it allegedly violates the Constitution of Colorado and Section One of the Fourteenth Amendment to the Constitution of the United States. Specifically, petitioner alleges that under the original order he will be deprived of due process and equal protection of the laws in that he is prohibited from appearing in Colorado courts henceforth in propria persona; that if he attempts to do so, not being able to secure counsel, he will suffer the same or similar punishment in the future as that with which he is now threatened. He argues that such an order creates a monopoly of Colorado attorneys and deprives him of his constitutional right to represent himself and his three minor children in Colorado courts.

"Petitioner claims generally that the denial to him of his right to appear pro se in the courts of Colorado and the subsequent order to show cause for violation of that order is in violation of the "Civil Rights" law, (R. S. Sec. 1979, 8 U.S.C.A. Sec. 43), and the First, Fifth, Sixth, Fourteenth and Fifteenth Amendments of the Constitution of the United States.

• • • •

"His claim that he will be denied a right to a trial by jury in the contempt proceeding in the state court is also not well founded. His claim that a denial of this right is in violation of the Sixth Amendment and the due process clause of the Fourteenth Amendment is without foundation. It is generally sufficient to state that it has been universally held that the provisions of the Sixth Amendment do not control the states except with regard to those rights which are specifically guaranteed by the due process clauses of the Fourteenth Amendment. The right of an accused to a trial by jury in a criminal case is mentioned in the Federal Constitution. Denying one such a right in a state court is, however, not a fundamental right guaranteed by the due process clause of the Fourteenth Amendment.

"Even conceding that the right to a trial by jury is fundamental in a criminal proceeding, the same would not apply in the case of a proceeding in criminal contempt. Punishment for contempt may be summary whether the contempt is direct or indirect, civil or criminal. Due process does not require a jury trial in such a proceeding. Courts have inherent power to punish for contempt and may protect the court's dignity and enforce.

"Petitioner's contention that the order of the Supreme Court of Colorado denying him the right to proceed pro se in that court in his own litigation is a denial of due process under the Fourteenth Amendment requires more consideration. The question is, does such an order violate petitioner's substantive rights under the Fourteenth Amendment? If the right to appear pro se is an element of that due process and is a fundamental right guaranteed by the Federal Constitution, then it does present a federal question which gives this court jurisdiction. If, however, the right so to appear is not a fundamental right of due

process but instead is a mere matter of procedure, then how petitioner may be permitted to proceed in the state courts is for that court's determination under appropriate rules and regulations, and denying a litigant the right to proceed pro se would then raise no federal question.

• • • •

"The narrower point in this case is that *a court has right by reasonable rules and regulations to provide for orderly procedure not only generally but in specific cases.* The order which is sought to be enjoined clearly indicates that it was directed against petitioner because he refused to conform to the ordinary and regular rules laid down by the Supreme Court and the courts of Colorado pertaining to the conduct of hearings therein. If that is so, certainly the order is justified and the citation for contempt is proper. *This opinion is not based upon the narrower question that the manner in which one may be permitted to appear in a state court, whether pro se or whether by counsel, relates to procedure and must be determined according to the rules and orders of such a court and that denying one the right to appear pro se in a state court does not violate the due process clause of the Fourteenth Amendment* even if it be conceded that in the federal court a litigant has such a right. *The conclusion is, therefore, inescapable that the complaint fails to present a federal question and the court is without jurisdiction.*" (Emphasis supplied.)

There is little further authority on the right of an individual to prosecute actions pro se, but the following quotation from *Opinion of the Justices,* 289 Mass. 607, 194 N.E. 313, 317, indicates that the right involves procedure only, and is subject to restriction where the public interests so require:

"Individuals have been permitted to manage, prosecute or defend their own actions, suits, and proceedings, and to defend prosecutions against themselves *except when the public welfare demanded otherwise.* * * *" (Emphasis supplied.)

The following quotation from *Percy's Case,* 36 N. Y. 651, 652, while it involved the disbarment of an attorney, applies *a fortiori* to one representing himself *in propria persona*:

"* * * By whatever cause the conduct of the appellant was induced, it is clear, that it was such as wholly to unfit him to practice the profession usefully to the public or beneficially to himself. His credibility was destroyed; his character had become bad; he was crowding the calendar with vast numbers of libel suits, in his own favor, and in the habit of instituting additional libel suits upon the answers to those previously brought by him. In one instance, at least, he had sued his client in a justice's court, and when beaten upon trial, instead of appealing from the judgment, he commenced numerous other suits against him, in different towns, for the same cause, when he must have known that the demand was barred by the first judgment rendered. The only inquiry is, whether, in such a case, the court has the power to protect the public, by preventing such persons from practicing as attorneys and counsellors in the courts of the state, and by that means harass its citizens."

It must be assumed that the Colorado Supreme Court had grounds for its opinion in *Shotkin v. Kaplan, supra,* but if any confirmation is required it will be found in Judge Kennedy's opinion in *Thomas A. Edison, Inc. vs. Shotkin,* (D.C. Colorado), 69 Fed. Supp. 176; appeal dismissed, 163 Fed. (2d) 1020; certiorari denied and application for appeal denied, 332 U. S. 813; rehearing denied,

332 U. S. 839. (Compare *Shotkin v. Kennedy, Acting Judge,* Motion for leave to file writ of mandamus denied, 326, U. S. 684.)

Summarizing, certainly courts have the right to protect themselves and the public interest unless a constitution or statutory provision prohibits it.

II.

ANSWERS TO CONTENTIONS OF PETITIONER

Petitioner contends that the proceeding of the Supreme Court of the State of Colorado was one involving criminal contempt and that the Court failed to comply with the requirements of due process of law and equal protection of laws under the Fourteenth Amendment. He further contends that the Court erred in its distinction between plaintiff and defendant.

The question of procedure in a criminal contempt case was considered by Judge Huxman in *Shotkin v. Burke, et al., supra,* in which the Court stated that the rules that apply to a criminal proceeding do not apply to a proceeding in criminal contempt. The case of *Uveges v. Pennsylvania,* 335 U. S. 437, was a case involving a felony prosecution and hence not applicable to a criminal contempt proceeding.

As to the right of accused to counsel under the Fourteenth Amendment, we refer the Court to an annotation appearing at 93 Law. Ed. 137, 138, as follows:

> "On the other hand, as regards state prosecutions, no provision of the Federal Constitution specifically guarantees a defendant the right to counsel; and the only pertinent provision is the general guaranty of the Fourteenth Amendment that no state shall deprive any person of life, liberty, or property without due process of law.
>
> "Although a denial by a state of rights or priv-

ileges specifically embodied in the Sixth Amendment may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth Amendment, the two constitutional provisions are not coextensive as regards an accused's right to counsel. The Sixth Amendment applies only to trials in Federal courts. On the other hand, the due process of law which the Fourteenth Amendment exacts from the states is not confined by any absolute rule such as that which the Sixth Amendment contains in securing to an accused the assistance of counsel for his defense, does not compel the states to follow the Federal process of law, and does not of its own force require appointment of counsel for one charged in a state court with crimes merely because he would have a constitutional right to the assistance of counsel in a comparable Federal case. Consequently, Rule 44 of the Federal Rules of Criminal Procedure, supra, cannot be regarded as defining, even by way of analogy, the minimum standard of due process required under the Fourteenth Amendment."

It is fundamental that there is a vast difference between a criminal proceeding and a criminal contempt proceeding. Hence it cannot be argued that the requirements that a criminal proceeding must necessarily be adhered to in a criminal contempt proceeding. In this connection we point out that petitioner has failed to cite any authority whatsoever requiring a jury trial and court appointed counsel in a criminal contempt case.

Petitioner further complains that he was not given an opportunity to produce witnesses in open court and was denied oral argument. In this connection we wish to point out that under the Order to Show Cause (R. 6), the petitioner was afforded ample opportunity to present his defenses and to have his day in court. However, petitioner contented himself with filing numerous dilatory motions

and petitions. Although he generally denied the allegations of the complaint in contempt the various statements made by petitioner in his said motions and petitions constituted an admission of the charges, namely that he had instituted various actions and represented himself as a plaintiff without counsel, contrary to the mandate of the Supreme Court of Colorado in *Shotkin v. Kaplan, supra.* Hence it became unnecessary for the court to take testimony. 17 C.J.S. 103.

Petitioner further complains "that the State Supreme Court by staying the operation of its sentence 'until the further order of court' creates an undulating threat of an attainder character." We fail to understand how the suspension of the court's punishment can possibly be prejudicial to the petitioner. Further, we submit that the court has inherent power to suspend its order and that same does not in any way violate any rights of the petitioner under the Federal Constitution.

III.

CONCLUSION

In conclusion, it is respectfully submitted that the petition for writ of certiorari should be denied since there are no special and important reasons for granting same and there is no Federal question of substance involved in the decision of the Colorado Supreme Court. Hence, this Honorable Court has no jurisdiction and should deny certiorari.

Respectfully submitted,

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